APPENDIX

W. S. BURCH

45 L. D. 473.

Instructions, September 12, 1916.

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VOGELSANG, First Assistant Secretary:

July 27, 1916, the Commissioner of the General Land Office submitted with request for instructions the question whether in the issuance of a fee patent to W. S. Burch, the purchaser of the allotment of Hiram Brown, a non-competent Shoshone allottee No. 242, including the N. E. ¼ S. E. ¼, Sec. 33, N. W. ¼, S. W. ¼, Sec. 34, T. 1 N., R. 4 E., W. R. M., Wyoming, the land covered by approved railroad rights-of-way should be excluded from the patent or whether such patent should be issued merely subject to the rights-of-way of the railroad companies.

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It has been the general practice of this Department to issue patents for lands crossed by rights-of-way *subject to the right of occupancy and user by railroad companies of their* approved rights-of-way and station grounds. The case of *Eugene McCarthy* (14 L. D., 105), involved a conflict of 2.72 acres between station grounds and a placer entry. The Department in concluding its opinion said:

> "The mineral claimant *must therefore take the land in dispute* (2.72 *acres*) *subject to the right of occupation by said company for station purposes.* It was held in *Dakota Central Railroad Company* v. *Downey* (8 L. D., 115, 120), that any patent granted 'which should include a portion of this grant to the railroad company, must therefore be subject to that grant, because the grant is already perfect and complete.'

"Patent may issue to said McCarthy therefore for said placer claim, *but subject,* as to that in conflict, *to the right of occupation by said company for station purposes.*"

In the case of *Pensacola and Louisville Railroad Company* (19 L. D., 386), it was held that the land over which a right-of-way is located may be disposed of by patent to others, *subject to whatever rights the company may have in the same.* This view was reiterated in the case of *Brucker* v. *Buschmann* (21 L. D., 114). The same principle was applied to a toll road the grant of a right-of-way for which arose pursuant to Section 2477, Revised Statutes, which provides that "the right-of-way for the construction of highways over public lands, not reserved for public use, is hereby granted." See *Wason Toll Road Company* v. *Townsite of Creede* (21 L. D., 351).

A right-of-way under this act of March 3, 1875 (18 Stat., 482), was involved in the case of *Mary G. Arnett* (20 L. D., 131), and the Department there said:

"The right-of-way clause should not then be inserted in the applicant's final certificate, unless it is necessary to protect whatever rights the railway company may have in the land by virtue of its grant.

"Under the act of March 3, 1875, *supra,* such protection does not appear to be necessary. The act itself affords ample protection to the company, if it has any rights which the courts may hereafter determine have not been forfeited. The language of section four of said act is, 'and thereafter *all such lands over which such right-of-way shall pass, shall be disposed of, subject to such right-of-way.' These lands are then disposed of, subject to such right-of-way, by virtue of the statute.*

"This is not a direction to the land department to insert limitations and restrictions in the final certifi-

cate and patent, but a legislative declaration of the reservation of a right-of-way to such railroad companies as may have complied with the law. The insertion of the right-of-way clause would answer no purpose except to embarrass the settler, and leaving it out does not affect the rights-of-way of any railroad company under said act."

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In the case of the *Southern Ute Allotments* (26 L. D. 77), in an opinion prepared by Assistant Attorney-General VAN DEVANTER, it was held *that fee patents should contain a clause setting forth that the conveyance was made subject to the railroad's right-of-way,* the grant being under the special act of June 8, 1872 (17 Stat., 339), which did not in terms protect the rights of the company.

In the case of the *Oregon Short Line Ry. Co.* v. *Harkness* (27 L. D., 430), a right-of-way across the Fort Hall Indian Reservation, for which $6,000 had been paid, was involved and such right-of-way land was embraced in the homestead entry of Harkness. It was there held that a reservation of a right-of-way should be incorporated in the final certificate and patent, where the right-of-way was obtained under a special act, but that no such reservation was required in the case of a right-of-way obtained under the act of March 3, 1875. In the case of *Denver and Rio Grande R. R. Co.* v. *Clack* (29 L. D., 478), it was again held that a reservation of a right-of-way granted under the act of March 3, 1875, in final certificate and patent, was not necessary and should not be inserted.

In instructions of November 3, 1909 (38 L. D., 284), as amended January 19, 1910 (38 L. D., 399), the practice as indicated and the distinction between rights-of-way under general and special acts was preserved and reannounced. *It will be borne in mind that the excepting or reservation clause involved was not an exclusion or elimination of an area of land but was a clause stating that the patent or con-*

veyance was subject to the right-of-way of the specific company under the particular special act. The above-mentioned regulations are cited and explained in the instructions of February 2, 1912 (40 L. D., 398), and it was there said:

> "Applicants to enter public lands that are affected by a mere pending application for right-of-way should be verbally informed thereof and given all necessary information as to the character and extent of the project embraced by the right-of-way application; and, further, *that they must take the land subject to whatever right may have attached thereto under the right-of-way application,* and at the full area of the subdivisions entered, irrespective of the questions of priority or damages, these being questions for the courts to determine."

In the case of the *Schirm-Carey and other placers* (37 L. D., 371, 374), the grant of the Atlantic and Pacific Railroad Company was involved. The 200-foot right-of-way covering about 107.33 acres, crossed the affected locations and had been excluded from the patent proceedings and the entry. The Department said:

> "The difficulties and perplexities involved in the various aspects of the case, in view of the practice with respect to the disposition of lands in a similar situation under other public land laws, as well as the serious question involved in the bisection of the claim by reason of the exclusion of the railroad right-of-way, is deemed by the Department to justify the conclusion reached by your office, *that in no event can the entry as to any of the claims be passed to patent in the absence of supplemental patent proceedings including the previously excluded area constituting the railroad right-of-way.*"

In instructions of March 13, 1911 (39 L. D., 565), involving the Northern Pacific right-of-way across the tribal

lands of the Fond du Lac Indian Reservation in Minnesota, where the company had paid $10 per acre for the area of its right-of-way, it was said:

"While the right-of-way granted the Northern Pacific Railway Company by the act of 1864 is a grant in fee, it is not a fee simple but is subject to reversion in the event that the company should cease to use the land for railroad purposes. *It is not the rule of the Department to except from patents issued to entrymen under the public land laws the area embraced in the right-of-way across the lands entered;* nor had it been the practice to relieve purchasers under the public land laws from paying for the full area of the tract purchased, notwithstanding that such purchase is made subject to the company's right-of-way.

"*To except from a patent a tract of land included in the right-of-way would be to reserve a narrow strip of land which, if abandoned by the railroad company, would revert to the Government and would not inure to the benefit of the purchaser of the subdivisions traversed by such right-of-way.*

"It is believed that damages paid by the railway company in this case were merely damages resulting from the construction of the railroad across the reservation and in no sense represented a purchase of the land covered by the right-of-way. As above indicated, therefore, I must decline to approve the letter prepared by your office."

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Considerable research has disclosed to the Department but two instances in which the acreage in a right-of-way has been ordered deducted from the legal subdivision affected and the land patented exclusive of such right-of-way. One of these cases is that of the Northern Pacific right-of-way and station grounds within the Flathead Indian Reser-

vation. By the act of July 4, 1884 (23 Stat., 89), $16,000 was appropriated by Congress to pay the Indians for the surrender and relinquishment to some 1,300 acres included in the right-of-way and 130 acres covered by station grounds pursuant to the agreement of September 2, 1882, between the Government and the Indians respecting such a cession. The railroad company paid into the Treasury said sum of $16,000 prior to the act. In a letter prepared in the General Land Office and approved by this Department, on April 25, 1910, it was stated that as the right-of-way strip and the station grounds had been relinquished prior thereto such lands were not subject to disposal under the acts of April 23, 1904 (33 Stat., 302), and May 29, 1908 (35 Stat., 448), providing for the disposition of the Flathead lands. The opinion was there expressed that title to none of such railroad lands should be disposed of to the homestead settlers and that in original applications and patent certificates there should be excluded the acreage covered by the right-of-way and the station grounds. The conclusion thus reached would appear to be directly contrary to the doctrine announced in the prior cases of the *Oregon Short Line* v. *Harkness,* and the *Southern Ute allotments, supra,* and also to the subsequent *Fond du Lac Reservation* case above cited.

The other instance of exclusion arose in connection with the case of *George F. Wunsch* (43 L. D., 551). It was there held that the 180-foot strip reserved and withdrawn under the act of June 25, 1910 (36 Stat., 847), for an electrical transmission line should be excepted and excluded in the entry papers and in the patent. Proper regulations under this decision were promulgated November 23, 1915 (44 L. D., 412).

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The Supreme Court in *Railroad Company* v. *Baldwin* (103 U. S., 426, 430), said:

"We are of opinion, therefore, that all persons acquiring any portion of the public lands, after the passage of the act in question, took the same subject to the right-of-way conferred by it for the proposed road."

In *Smith* v. *Townsend* (148 U. S., 490, 499), is found the following:

"Doubtless, whoever obtained title from the Government to any quarter section of land through which ran this right-of-way would acquire a fee to the whole tract subject to the easement of the company; and if ever the use of that right-of-way was abandoned by the railroad company the easement would cease, and full title to the right-of-way would vest in the patentee of the land."

This opinion was expressed in connection with the right-of-way through Indian land in Oklahoma arising under the act of July 4, 1884 (23 Stat., 73).

In the very recent case of *Rio Grande Western Railway Company* v. *Stringham*, decided November 1, 1915 (239 U. S., 44), a conflict between the right-of-way under the act of March 3, 1875, and a placer patent was involved. The opinion was prepared by Justice VAN DEVANTER, who was thoroughly familiar with the practice of the land department and who approved the conclusions reached in the *Southern Ute Allotment*, *Oregon Short Line* v. *Harkness*, and *Denver and Rio Grande Company* v. *Clack*, cases before cited. The following are certain excerpts therefrom:

"At the trial the facts were specially found and judgment for the defendants was entered upon the finding. In reviewing that judgment the Supreme Court of the State, accepting the findings below, held that the plaintiffs in virtue of proceedings had in the Land Department under the Right-of-way Act while the land was yet public acquired a right-of-way two hundred feet

wide through the lands afterwards embraced in the mining claim *and that the defendants' title under the placer patent was subject to this right-of-way*, and thereupon reversed the judgment and remanded the case with a direction to 'enter a judgment awarding to the plaintiff title to a right-of-way over the lands in question one hundred feet wide on each side of the center of the track.' 38 Utah 113. Acting upon this direction the trial court vacated its prior judgment and entered another adjudging the plaintiff to be 'the owner of a right-of-way' through the mining claim one hundred feet wide on each side of the center line of the railroad, declaring the plaintiff's title to such right-of-way good and valid, and enjoining the defendants from asserting any claim whatever to the premises, or any part thereof, *adverse to the plaintiff's 'said right-of-way.'*"

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"The right-of-way granted by this and similar acts is neither a mere easement, nor a fee simple absolute, but a limited fee, made on an implied condition of reverter in the event that the company ceases to use or retain the land for the purposes for which it is granted, and carries with it the incidents and remedies usually attending the fee. *New Mexico* v. *United States Trust Co.*, 172 U. S. 171, 183; *Northern Pacific Ry. Co.* v. *Townsend*, 190 U. S. 267, 271; *United States* v. *Michigan*, 190 U. S. 379, 398; *West Un. Tel. Co.* v. *Pennsylvania R. R.*, 195 U. S. 540, 570. The judgment under review does not in words so characterize the plaintiff's right nor was it essential that it should do so. It describes the right in the exact terms of the Right-of-Way Act and evidently uses those terms with the same meaning they have in the act. So interpreting the judgment, as plainly must be done, we thing it accords to the plaintiff all to which it is entitled under the act."

A homestead patent in conflict with the railroad right-of-way under the act of March 3, 1875, was involved in *Barlow* v. *Northern Pacific Ry. Co.* (240 U. S., 484). The court there treats the prior *rights of the railroad company as being "paramount"* and concludes that *the homestead patent* under the facts as found *was subject to the right-of-way.*

In view of the foregoing and of the well-established and long-continued practice of the land department with respect to the issuance of patents for lands crossed by prior rights-of-way, it is directed that the fee patent to be issued to W. S. Burch includes and describes the legal subdivision covered by the Indian allotment *inclusive of the right-of-way areas* and further that usual clause indicating *that the conveyance is subject to the two approved rights-of-way* mentioned be inserted. (All italics supplied by petitioners.)